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HAROLD B. WILLEY,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 333

EVERETT EDWARD HACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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OPINIONS BELOW

The majority opinion of the Court of Appeals for the Seventh Circuit, and the dissenting opinion of Chief Judge

Major, are now reported in *United States* v. *Hack*, 205 F. (2d) 723-729.

QUESTION ONE

Respondent seems to admit that the decision of the lower courts upon the question of the sufficiency of the indictment as raised in Question One of defendant's petition is in conflict with applicable decisions of this Court in *United States* v. *Carll*, 105 U. S. 611, 613, *United States* v. *Simmons*, 96 U. S. 360, 362, 366, and *United States* v. *Hess*, 124 U. S. 483, 488 (Petition 17, 18), but it attempts to avoid the effect of such admission in footnote 1, page 7 of its brief by saying that

> "The later decisions of this court have deprived *United States* v. *Carll*, 105 U. S. 611 of any vitality";

the footnote is carried over to page 8 of respondent's brief, where it is said:

> "*Carll*, moreover, was decided long prior to the advent of Rule 7(c), which was clearly satisfied here."

On page 7 of respondent's brief it is said:

> "The allegations that the notes were passed with intent to defraud plainly implied that the defendants knew they were counterfeit for without knowledge of the counterfeit nature of the notes, the passing would not have been with intent to defraud."

We agree that without knowledge of the counterfeit nature of the notes, the passing would not have been with intent to defraud; this statement of respondent must be what the court had in mind in *United States* v. *Carll*, 105 U. S. 611, 613, when it said that,

> "knowledge that the instrument is forged and counterfeited is *essential to make out the crime;* and an

> uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object. * * * This indictment, by omitting the allegation contained in the indictment in *United States v. Howell* (11 Wall. 432), and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged, and counterfeit, fails to charge him with any crime. The omission is of matter of substance," and not of form. (Emphasis added.)

Rule 7(c) of Federal Rules of Criminal Procedure is apparently based upon the language used in the *Carll* case, as it provides that

> "the indictment shall be a plain, concise and definite written statement of the *essential facts constituting* the offense charged." (Emphasis added.)

Of course respondent is in error in the statement that

> "the allegation that the notes were passed with intent to defraud plainly implied that the defendants knew they were counterfeit." (p. 7, respondent's brief.)

Many dollars are "passed with intent to defraud," in fraudulent transactions, where the "intent to defraud" may, or may not, involve the validity of government obligations, and it will not do to give judicial sanction to the proposition that the allegation that notes were passed with intent to defraud plainly implied that the passer knew they were counterfeited. Attention is directed to the Government's evidence in this case which shows that the bill or note in question was

> "a dangerous and deceptive counterfeit note. The

> average merchant would be apt to take in such a counterfeit and not be able to tell its counterfeit nature." (R. 17, 18.)

Count I of the indictment charges that on the 15th day of December, 1951, Ada Miller did, at Indianapolis, Indiana, with intent to defraud, pass a counterfeited obligation of the United States (R. 1); it attempted to charge petitioner Hack as an aider, and, after thus describing the offense against Ada Miller, as indicated, but omitting therefrom the essential element of guilty knowledge, the charge is

> "That Edward Everett Hack and David Bocock did procure the commission of said offense by Ada Miller." (R. 2.)

The indictment does not charge that Hack, as an aider and abettor, acted "with similar intent," or with "guilty knowledge," or, "with being present at the commission of said felony, feloniously aiding, inciting and abetting said Ada Miller," or, that as an accessory before the act committed by the principal, he "feloniously counseled, aided, incited and procured said principal to commit, in manner and form aforesaid, the said felony." See Bishop's Forms (1885), p. 52, form 114; or, as the indictment charged in *Campbell* v. *United States*, 167 F. (2d) 451, 452 (5 C. A.) that the aiding and abetting defendant

> "was then and there present, aiding, abetting, counseling, assisting and advising the defendant John Allen Campbell the offenses aforesaid in the manner and form aforesaid to do and commit."

The indictment which defendant now brings to the Court does not charge Hack with the commission of any offense, fixes no time or place of the commission of any criminal act by Hack, but simply says that

> "Hack * * * did procure the commission of said offense,"

and upon such statement he now stands convicted and must serve five years in the penitentiary, with no valid charge against him.

The statement of respondent that *United States* v. *Carll*, 105 U. S. 611, has been deprived of its validity by later decisions of this Court, and the further statement that the present indictment satisfies the requirements of Rule 7(c), seem to make it imperative that the writ prayed for herein should be granted in order that this Court may determine whether federal criminal procedure can be sustained which is in direct conflict with the former decisions of this Court as charged in petitioner's Question One.

Defendant very earnestly contends that *United States* v. *Carll*, 105 U. S. 611, has not been overruled, nor deprived of any of its vitality, but it is still in full force, and governs the procedure to be followed in forgery cases; it has been so regarded by other courts, both before and since the advent of Rule 7(c), and said Rule does not authorize the omission of an *essential* element from an indictment; Rule 7(c) has not been satisfied by the indictment which defendant now presents to this Court.

To sustain this contention, defendant calls attention to the following decisions:

On January 3, 1951, the Seventh Circuit, in *United States* v. *Kelley*, 186 F. (2d) 598, 602, relied upon, and cited, *United States* v. *Carll*, 105 U. S. 611, 613, to support its position

> "that proof of intent by defendant to defraud and knowledge on his part that the notes were counterfeited is essential to his conviction. *United States* v. *Carll*, 105 U. S. 611, 613, 26 L. Ed. 1135."

On June 14, 1949, the Seventh Circuit, in *United States* v. *Litberg,* 175 F. (2d) 20, 22, relied upon *United States* v. *Carll* to support its position that

> "The scienter of the offenses charged is that the notes were passed or possessed 'with intent to defraud and with knowledge that they were counterfeited,' and in the absence of proof of such intent and knowledge a judgment of conviction cannot stand. *United States* v. *Carll,* 105 U. S. 611, 613, 26 L. Ed. 1135."

On December 11, 1951, District Judge Mathes, of the Southern District of California, in *United States* v. *Schneidermann,* 102 F. Supp. 87, 92, relied upon and quoted from *United States* v. *Carll,* 105 U. S. 611, 612-613, as follows:

> "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

Judge Mathes also relied upon *United States* v. *Hess,* 124 U. S. 483, which he quoted from on page 91 of 102 F. Supp., and which is cited and relied upon by defendant on page 18 of his petition.

On April 10, 1953, the Fifth Circuit, in *United States* v. *Debrow,* 203 F. (2d) 699, 701, construed Rule 7(c), as follows:

> "Rule 7(c) is designed to simplify indictments by eliminating unnecessary phraseology which needlessly burdened many indictments under the former practice. It does not and it was never intended that this rule should alter or modify the fundamental functions and requirements of indictments. Every ingredient or essential element of the offense sought to be charged must still be alleged in the indictment. *Wilson* v. *United States,* 158 F. (2d) 659, 67 S. Ct. 1095."

We understand that certiorari was granted by this Court in the *Debrow* case on June 15, 1953. If the *Debrow* case turns upon, or is materially affected by the contention of the respondent that under Rule 7(c) it is no longer necessary to set out essential facts which constitute the offense charged in indictments for uttering forged obligations of the United States, then petitioner's case bears a similarity to the *Debrow* case and certiorari should be granted.

On April 1, 1948, the Fifth Circuit, in *Campbell* v. *United States,* 167 F. (2d) 451, 453, relied upon *United States* v. *Carll,* 105 U. S. 611, to support its conclusion that the statute upon which the indictment was founded in that case only described the general nature of the offense prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, stated no matters upon which issue could be formed for submission to a jury.

On March 5, 1947, District Judge Swygert, for the Northern District of Indiana, in *United States* v. *McCulloch,* 6 F. R. D. 559, held that Rule 7(c) of the Rules of Criminal Procedure did

> "not change the essential requirements of a valid indictment. Each and every element of an offense must

be charged in an indictment. *United States* v. *Standard Brewery*, 251 U. S. 210, 46 S. Ct. 139, 64 L. Ed. 229. The rule itself provides that it shall be a 'definite written statement of the essential facts constituting the offense charged.' "

If Rule 7(c) of the Federal Rules of Criminal Procedure is to be construed as authorizing the omission from an indictment for uttering a forged obligation of the United States the essential fact of "guilty knowledge," and omitting the essential fact of "intent to defraud," then it is in violation of that part of the Sixth Amendment to the United States Constitution which provides that in all criminal prosecutions, the accused shall be entitled to be informed of the nature and cause of the accusation against him, and it is in violation of that part of the Fifth Amendment to the United States Constitution which commands that he shall not be held to answer for an infamous crime, unless on a presentment or indictment of a Grand Jury, and he shall not be deprived of his liberty or property, without due process of law.

These constitutional provisions require that the indictment must be a legal and valid charge, containing all the essential elements necessary to constitute the offense intended to be punished. *United States* v. *Carll*, 105 U. S. 611, 613; *Campbell* v. *United States*, 167 F. (2d) 451, 453.

In defendant's Question One, page 18 of his petition, it is contended that the decision of the lower court in granting leave to the United States to "amend the indictment by reversing the name of the defendant, Edward Everett Hack, to Everett Edward Hack * * * and the indictment is amended accordingly," is a decision of a federal question in direct conflict with the former decision

of this Court in a similar matter in *Ex Parte Bain*, 121 U. S. 1 (Pet. 18).

Respondent seems to admit that defendant's contention in this regard is correct, but in a footnote on page 8 of its brief, the view is taken that the changing of the indictment by such amendment "was obviously not a substantial change as was involved in *Ex Parte Bain*, 121 U. S. 1."

Defendant contends that the accused can only be tried upon the indictment as found by the Grand Jury, and especially upon all its language found in the charging part of the instrument, which should include his correct name; this was the rule which was approved in *Ex Parte Bain*, 121 U. S. 1, and the court refused to follow the doctrine that "surplusage" could be stricken out of an indictment.

This question should be settled by this Court, because the Courts of Appeal have divided on it; see *Stewart* v. *United States*, 12 F. (2d) 524, 525 (9 C. A.); *Dodge* v. *United States*, 258 Fed. 300 (2 C. A.), which hold that indictments cannot be amended by the court; in *United States* v. *Fawcett*, 115 F. (2d) 767 (3 C. A.), the court decided that some amendments may be made; in *United States* v. *Denny*, 165 F. (2d) 668, 669, 670 (7 C. A.), it is held that an indictment requiring amendment of substance must be sent back to the Grand Jury, but the majority opinion concluded that the change of defendant's name from "Kenny" to "Denny" was only a formal matter and could be made by amendment; Circuit Judge Minton dissented, and in a separate opinion, 165 F. (2d) 671-673, held that amending the body of the indictment in such a material matter as the defendant's name vitiated the indictment and destroyed the court's jurisdiction.

In *Jay G. Williams* v. *United States*, 179 F. (2d) 656, the

Fifth Circuit approved of an amendment made to an indictment which charged defendant Williams and Lindsley Lumber Co., with others, with having violated Section 52 (now Section 242), Title 18 U. S. C. A., Section 20, U. S. Criminal Code, where the amendment consisted of changing the name of "Lindsley Lumber Co." to that of "Dania Supply Company, doing business as the Lindsley Lumber Co."; however, Dania Supply Company was not convicted; the question was presented by defendant Williams; the court concluded that the amendment was without the slightest prejudice to Williams. We understand certiorari was granted in the *Williams* case, 340 U. S. 850, and the decision was affirmed, 341 U. S. 97, but the question as to the validity of the indictment after amendment was apparently not an issue in this Court.

In considering this question, it should be observed that Rule 7(e) of the Federal Rules of Criminal Procedure provides that

> "The court may permit an information to be amended at any time before verdict or finding if no additional offense is charged and if substantial rights of the defendant are not prejudiced."

But no such right to amend is provided as to *indictments,* which should be a persuasive reason for the conclusion that *Ex Parte Bain,* 121 U. S. 1, is the law which should govern in this case.

QUESTION TWO

On page 9 of respondent's brief, in discussing Question Two, it is said, in footnote 3, that *Fiswick* v. *United States,* 329 U. S. 211, *Logan* v. *United States,* 144 U. S. 263, and *Krulewitch* v. *United States,* 336 U. S. 440, cited by peti-

tioner for the proposition that admissions and declarations of a co-conspirator, after confession of his own guilt to officers, are inadmissible against his erstwhile fellow conspirators, as claimed by petitioner on page 24 of his petition, are inapposite, because Monroe's testimony related to acts and declarations by petitioner himself; this statement of respondent is made in connection with the further statement on page 9 of its brief that

> "After Monroe arrived (in Indianapolis) with his family on December 12, petitioner, in an unsuccessful effort to get Monroe to join the conspiracy," showed his $2,000 in "real mint" counterfeit currency, stated that he would give the orders about what to do, and announced that he was the "head man."

But no conspiracy was shown to exist on December 12th, or the early morning of December 13th; no connection is claimed to have existed between Monroe and petitioner, except as to what occurred between them on December 12th and 13th; petitioner, his sister Ada, and Bocock, met at the home of Monroe in Louisville on December 9th, but no one claims that there was any evidence of any conspiracy being in existence at that time, or that the commission of any offense was in contemplation or in any manner referred to at that time; none of the statements or acts of Monroe, after December 13th, was admissible against petitioner, whether they were acts or declarations of Monroe's own conduct, or whether he was relating acts or declarations of petitioner, because Monroe and petitioner were not shown by any evidence to have been connected in any manner, or had any contact or dealings with each other after December 13th.

Petitioner respectfully submits that his petition for certiorari should be granted.

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